

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAII ELECTRIC LIGHT COMPANY, INC.)
For Approval of a Restated and)
Amended Power Purchase Contract)
with Apollo Energy Corporation,)
and a Commission Determination that)
the HELCO-Owned Interconnection)
Facilities can be Constructed)
Above the Surface of the Ground,)
Pursuant to Hawaii Revised Statutes)
§ 269-27.6(a).)

DOCKET NO. 04-0346

ORDER NO. 21678

Filed March 9, 2005
At 2 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

RECEIVED
2005 MAR 10 A 8:12
DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAII ELECTRIC LIGHT COMPANY, INC.)
For Approval of a Restated and)
Amended Power Purchase Contract)
with Apollo Energy Corporation,)
and a Commission Determination that)
the HELCO-Owned Interconnection)
Facilities can be Constructed)
Above the Surface of the Ground,)
Pursuant to Hawaii Revised Statutes)
§ 269-27.6(a).)
_____)

Docket No. 04-0346

Order No. 21678

ORDER

The commission denies WAILUKU RIVER HYDROELECTRIC LIMITED PARTNERSHIP's ("Movant") Motion for Enlargement of Time to Intervene, filed on February 24, 2005. This denial renders moot Movant's underlying Motion to Intervene.

I.

Procedural Background

HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO") requests the commission's approval: (1) of a Restated and Amended Power Purchase Contract, dated October 13, 2004 ("RAC"), with Apollo Energy Corporation ("Apollo"); and (2) of other matters related to the RAC.¹ In addition, HELCO requests that the commission

¹HELCO's Application, Exhibits 1 - 12, Verification, and Certificate of Service, filed on November 26, 2004 (collectively, the "Application").

find that the two (2) 69 kilovolt line drops associated with the HELCO-owned interconnection facilities can be constructed above the surface of the ground, consistent with Hawaii Revised Statutes ("HRS") § 269-27.6(a).²

HELCO makes its requests in accordance with Hawaii Administrative Rules ("HAR") § 6-60-6(2) and HRS § 269-27.6(a), respectively. HELCO served copies of its Application upon: (1) the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate" or "CA") (collectively, the "Parties"); and (2) Apollo.

On January 24, 2005, the Parties submitted their Proposed Stipulated Procedural Order for the commission's review, in compliance with Order No. 21499, filed on December 20, 2004. On January 27, 2005, the commission approved, with modification, the Parties' Stipulated Procedural Order ("Order No. 21566").

Order No. 21566 sets forth the procedural deadlines that govern this proceeding:

CA's information requests ("IRs") to HELCO	November 26, 2004
HELCO's responses to the CA's IRs	January 27, 2005
Clarification meeting	February 7, 2005
CA's position statement	February 22, 2005
HELCO's reply to the CA's position statement, if necessary	March 1, 2005

²Id.

On February 22, 2005, the Consumer Advocate filed its position statement, as supplemented on February 24, 2005.

On February 24, 2005, Movant, through its representative located in Annapolis, Maryland, filed its Motion to Intervene and For Enlargement of Time to Intervene ("pleading"). It served copies of its pleading upon HELCO, Hawaiian Electric Company, Inc., and the Consumer Advocate.

On March 1, 2005, HELCO filed its response to the Consumer Advocate's initial position statement, and on March 3, 2005, HELCO filed its memorandum in opposition to Movant's pleading ("Memorandum").

II.

Movant's Position

Movant, the owner of a 12 megawatt ("MW") hydroelectric facility on the island of Hawaii, supplies energy to HELCO under a power purchase agreement ("PPA") approved by the commission on October 28, 1991.³ The PPA provides HELCO with the right to curtail Movant's output under certain conditions, and when curtailment is necessary: (1) it will be conducted, to the extent possible, in the reverse chronological order of the seniority dates of the contracts of all suppliers; and (2) the chronological seniority date of a contract is the date of the commission's approval of the contract.⁴

³Movant's pleading, at 1 - 2.

⁴Id. at 2.

(11)

Movant represents that: (1) it has invested \$32.7 million in the construction of its Wailuku River hydroelectric project, located near Hilo; and (2) a portion of its investment is the result of State of Hawaii (the "State"), special purpose revenue bonds, which are currently outstanding in the amount of approximately \$20 million.⁵

In seeking to intervene, Movant asserts:

1. Apollo intends to construct a new wind facility on land leased from Kamehameha Schools/Bishop Estate, on a different site from its current wind turbines. The existing 7 MW project, "located on Apollo land[,] will either be used to power other applications or will be subsequently retired."⁶ A new substation, power line, and interconnection facilities will be constructed. Apollo, in essence, is constructing a new wind project.

2. The RAC provides that the chronological seniority date for the first 7 MW of Apollo's output is September 15, 1986. "This in effect, transfers the seniority date from [Apollo's] old project to the new project located on a different site and places it ahead of [Movant's hydroelectric facility]. In the event this increased energy causes a situation in which curtailment is necessary Apollo would have [Movant] (and Hawi) curtailed before

⁵Id.

⁶Id. at 3.

it is curtailed. This is a direct and negative impact on [Movant's] interest and sets a bad policy precedent."⁷

3. Movant "has been subject to curtailment in the past and ensu[ed] loss of revenue."⁸

4. Apollo may be the first independent power producer that is retiring its plant. The commission, thus, should articulate a policy on this matter.

5. While Movant supports the commission's approval of the RAC, it opposes the granting of a retroactive seniority date for a new site and facility as outlined in the RAC. Instead, the chronological seniority date should be the date of the commission's approval of the RAC. Thus, the approval of the RAC directly impacts Movant's rights under its PPA; specifically, it directly impacts [Movant's] property, financial interests, and the interests of the bondholders that are financing [Movant's] project.

In seeking to enlarge the time period by which to intervene, Movant contends:

1. HELCO's Application was not put on public notice.

2. It "just received information on the proceeding and the pre-hearing order on Friday, February 18, at 6:30 PM. The date of this motion is the first working day thereafter."⁹

⁷Id.

⁸Id. at 2.

⁹Id. at 6.

Movant's pleading submitted written rebuttal testimony on Apollo's behalf over four (4) years ago in Docket No. 00-0135.

The draft RACs, moreover: (1) addressed the transfer of the chronological seniority date of Apollo's existing wind farm to a similarly sized portion of Apollo's new wind farm; and (2) indicated that the capacity of Apollo's new wind farm would increase. Had Movant continued to monitor Docket No. 00-0135, "it would have known that HELCO and Apollo had finalized and signed the RAC on October 13, 2004 and that an application requesting approval of the RAC would be forthcoming in a separate docket."¹²

HELCO also contends that Movant's lack of public notice argument is unpersuasive and inconsistent with State law. Meanwhile, in response to Movant's contention of the apparent vagueness over the site of Apollo's new wind farm, HELCO states:

While the Application did not explicitly discuss the site of Apollo's new wind farm, the Application did state that Apollo was in the process of negotiating certain real property transactions related to where the land will be situated with a land owner, and the RAC itself did provide the tax map key numbers for the land on which Apollo's new wind farm will be located.¹³

¹²HELCO's Memorandum, at 5. HELCO notes that on October 13, 2004, HELCO and Apollo jointly submitted an executed copy of the RAC to the commission in Docket No. 00-0135, for informational purposes.

¹³Id. at 6.

B.

Intervention

HELCO reminds the commission that the granting of intervention is within its sound discretion, and in this instance, Movant fails to meet the applicable requirements under HAR § 6-61-55(b) and (d) governing intervention. Moreover, Movant's belated intervention, at this point in the proceeding, is inconsistent with HAR § 6-61-1, which provides in part that HAR chapter 6-61 "shall be liberally construed to secure the just, speedy, and inexpensive determination of every proceeding."

With respect to the merits of Movant's position, HELCO responds:

1. Movant misstates: (A) what facilities will receive the chronological seniority date of Apollo's existing wind farm; and (B) the nature, extent, and effects of its interests in this proceeding.

2. The transfer: (A) of the chronological seniority date of Apollo's existing wind farm to the same or a smaller sized portion of Apollo's new wind farm maintains the status quo as to the amount of capacity that is senior to Movant for chronological seniority date purposes; (B) does not result in additional capacity being given a more senior chronological seniority date than Movant; and (C) encourages the development of renewable energy facilities.

3. A number of factors contributed to the decision to allow a portion of Apollo's new wind farm to acquire the chronological seniority date of Apollo's existing wind farm.

HELCO was cognizant of the curtailment priority advantage issue. For this reason, it limited Apollo's chronological seniority to the Group A wind turbines, consisting of up to five (5) of the fourteen (14) total wind turbines that will comprise Apollo's expanded and repowered wind farm. The Group A wind turbines will have the identical allowed capacity as Apollo's existing wind farm: 7 MW.

4. The location of the new HELCO-owned three (3) 69 kV breaker switching station will be where the existing Apollo-owned one (1) 69 kV breaker switching station is located. Also, the site of Apollo's new wind turbines will use land adjacent to where the existing wind turbine generators are located.

5. Movant's proposal that a wind farm owner remain in the same location to retain its chronological seniority date will discourage innovation and technology, by precluding said owner from replacing old technology with new technology.

6. The concept of transferring a chronological seniority date to a similarly sized portion of a newer project with the same ownership, to a location at the same site, is included in a wind farm contract approved by the commission.¹⁴

Ultimately, HELCO reasons that the RAC does not provide for more capacity than what Apollo's existing wind farm

¹⁴HELCO cites to its power purchase contract with Hawi Renewable Development LLC in Docket No. 04-0016.

possesses, to become senior to Movant for chronological seniority purposes.¹⁵

IV.

Discussion

For good cause shown, HAR § 6-61-23(a)(2) authorizes the commission to enlarge the period of time to seek intervention "where the failure to [timely] act was the result of excusable neglect." Meanwhile, HAR § 6-61-55(d) provides that "intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." Moreover, intervention as a party in a proceeding before the commission is not a right; rather, it is a matter resting within the commission's discretion. *In re Hawaiian Elec. Co., Inc.*, 56 Haw. 260, 535 P.2d 1102 (1975).

HELCO filed its Application on November 26, 2004. The deadline for interested persons to timely move to intervene was December 16, 2004.¹⁶ No persons timely moved to intervene.

¹⁵If the commission is inclined to respond to Movant's concern, HELCO suggests that:

[T]he Commission could condition the transfer of Apollo's existing chronological seniority date to the Group A wind turbine generators on Apollo relinquishing its rights to a chronological seniority date of September 15, 1986 for Apollo's existing wind farm once Group A is placed in service. (Apollo should not have a concern with this requirement since it plans to dismantle and retire its existing wind turbine generators before placing in service its new wind turbine generators. See Apollo's Letter at 1.)

Id. at 10.

¹⁶HAR § 6-61-57(3)(A).

Hence, the Parties in this proceeding are HELCO and the Consumer Advocate.¹⁷

The commission finds that Movant makes no claim or showing of excusable neglect amounting to good cause shown, to warrant the granting of additional time, from December 16, 2004 to February 24, 2005, to file its Motion to Intervene.¹⁸ Movant does not attach any supporting affidavit that proffers any facts amounting to excusable neglect.¹⁹ Also, Movant does not state how, or at what point, it reviewed a copy of the RAC and ascertained its concerns over the curtailment issue.

Moreover, the commission notes that, in this instance, the discovery process is completed, the Parties have filed their respective position statements, and the proceeding is ready for decision-making on the merits. See HAR § 6-61-1.

The commission denies the Motion for Enlargement of Time to Intervene. This denial, in turn, renders moot the underlying Motion to Intervene.

¹⁷Apollo is not a party to Docket No. 04-0346.

¹⁸See, e.g., Docket No. 03-0369, *In re Puuwaawaa Waterworks, Inc.*, Order No. 21021, filed on June 2, 2004 (no excusable neglect); Docket No. 99-0207, *In re Hawaii Elec. Light Co., Inc.*, Order No. 19825, filed on November 27, 2002 (no excusable neglect); Docket No. 00-0063, *In re Soltur, Inc.*, Order No. 18114, filed on October 4, 2000 (no excusable neglect); and Docket No. 00-0017, *In re Laie Water Co., Inc.*, Order No. 17942, filed on August 2, 2000 (no excusable neglect).

¹⁹See HAR §§ 6-61-41(b) and 6-61-23(a)(2).

V.

Orders


THE COMMISSION ORDERS:


1. Wailuku River Hydroelectric Limited Partnership's Motion for Enlargement of Time to Intervene, filed on February 24, 2005, is denied.

2. Wailuku River Hydroelectric Limited Partnership's Motion to Intervene, filed on February 24, 2005, is rendered moot.

DONE at Honolulu, Hawaii MAR - 9 2005.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Michael Azama
Commission Counsel

04-0346.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 21678 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

WARREN H.W. LEE
PRESIDENT
HAWAII ELECTRIC LIGHT COMPANY, INC.
P. O. Box 1027
Hilo, HI 96721-1027

PATSY NANBU
DIRECTOR, REGULATORY AFFAIRS
HAWAIIAN ELECTRIC COMPANY, INC.
P. O. Box 2750
Honolulu, HI 96840

THOMAS W. WILLIAMS, JR., ESQ.
PETER Y. KIKUTA, ESQ.
GOODSILL ANDERSON QUINN & STIFEL
Alii Place, Suite 1800
1099 Alakea Street
Honolulu, HI 96813

WAYNE L. ROGERS
191 Main Street
Annapolis, Maryland 21401

Representative for WAILUKU RIVER HYDROELECTRIC
LIMITED PARTNERSHIP



Karen Higashi

DATED: MAR - 9 2005